

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JOHNNY ODELL REED,

Defendant.

CASE NO. 8:07CR125

TENTATIVE FINDINGS

The Court has received the Presentence Investigation Report (“PSR”) in this case. The parties have not objected to the PSR. See Order on Sentencing Schedule, ¶ 6. The government adopted the PSR. (Filing No. 51, 52.) The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 2005 WL 50108 (U.S. Jan. 12, 2005), the sentencing guidelines are advisory.

The Court has also considered the Defendant's motion for downward departure, deviation and/or variance (Filing No. 53). The government objects to this motion, arguing that it is precluded by the plea agreement. (Filing No. 59.)

The plea agreement provision provides: “By signing this agreement, you agree not to file any motion for downward departure for any reason, except for overstatement of criminal history.” (Filing No. 18, ¶ 3.) The Defendant’s motion is based on two grounds: 1) alleged over representation of criminal history; and 2) the pending sentencing guideline amendments regarding cocaine base. The plea agreement clearly allows for consideration of the portion of the motion alleging over representation of criminal history. With respect to the issue of the pending guideline amendments, while the plea agreement prohibits motions for downward departure it does not exclude motions for deviation or variance.

Therefore, the Defendant's motion will be addressed at sentencing and the government's objection (Filing No. 59) is granted in part and denied in part as specified below.

IT IS ORDERED:

1. The parties are notified that my tentative findings are that the PSR is correct in all respects;

2. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

3. Absent submission of the information required by paragraph 2 of this Order, my tentative findings may become final;

4. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing;

5. The Defendant's motion for downward departure, deviation or variance (Filing No. 53) will be heard at sentencing; and

6. The government's objection to the Defendant's motion for downward departure, deviation or variance (Filing No. 53) is granted in part and denied in part as follows:

- a. the objection is granted insofar as the motion for downward departure is intended to address issues other than the alleged over representation of criminal history;
- b. the objection is denied as to the motion for deviation or variance.

DATED this 12th day of September, 2007.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge